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11 DONAHUE FITZGERALD LLP AND  
12 JOHN GARDNER

13 UNITED STATES DISTRICT COURT  
14 NORTHERN DISTRICT OF CALIFORNIA

15 WAYMO LLC,

16 Plaintiff,

17 vs.

18 UBER TECHNOLOGIES INC.,  
19 OTTOMOTTO LLC, OTTO TRUCKING  
20 LLC,

21 Defendants.

Case No. 3:17-cv-00939-WHA

**NOTICE OF MOTION AND MOTION  
TO INTERVENE BY NON-PARTY  
JOHN GARDNER PURSUANT TO FRCP  
24(b); MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT;  
PROPOSED ORDER**

Date: To be determined by the Court  
Time: To be determined by the Court  
Dept.: Courtroom 12, 19th Fl.  
Judge: The Honorable William H. Alsup

Trial Date: February 5, 2018

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By the present motion, Mr. Gardner requests that this Court grant him permissive intervention under Rule 24(b) so he may fully litigate that motion. Under Rule 24(b), the district court has discretion to grant permissive intervention where the proposed intervenor’s “claim or defense and the main action have a question of law or fact in common.” *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108 (9<sup>th</sup> Cir. 2002), *abrogated on other gds. by Wilderness Society v. U.S. Forest Service*, 630 F.3d 1173, 1178 (9<sup>th</sup> Cir. 2011). The rule is liberal – “If there is a common question of law or fact, the requirement of the rule has been satisfied and it is then discretionary with the court whether to allow intervention. *Id.* at 1109, *quoting* 7C Wright. Miller & Kane, Federal Practice and Procedure, section 1191, 357-63 (2d ed. 1986). *See also Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9<sup>th</sup> Cir. 2003) (“Rule 24 traditionally receives liberal construction in favor of applicants for intervention. [Citation omitted.] Courts are guided primarily by practical and equitable considerations.”).

Under this liberal standard, the proposed intervenor’s common “claim or defense” need not be an actual “claim” in the sense of a claim on the merits asserted in a complaint or a “defense” raised in an answer. *See, e.g., Beckman Indus. v. International Ins. Co.*, 966 F.2d 470, 472-73 (9<sup>th</sup> Cir. 1992) (rejecting opponent’s argument that Rule 24(b) “only permits intervention for the purpose of litigating a claim on the merits in a pending action” and affirming order allowing non-party to intervene for limited purpose of seeking to modify a protective order), *cert. denied*, 506 U.S. 470, 113 S. Ct. 197 (1992). The other applicable requirements for permissive intervention – that the motion be timely and will not cause undue delay or prejudice – are satisfied here. As detailed in the accompanying motion, Waymo served the Rule 45 trial subpoena on Mr. Gardner on January 12, 2018, and Mr. Gardner promptly filed both motions after his counsel’s attempts to resolve the issue by meeting and

1 conferring failed.<sup>1</sup> Waymo is able to avoid any undue delay or prejudice by promptly  
2 providing Mr. Gardner with its proposed questions, which it has to prepare in any event. Any  
3 “delay” that this may cause will be more than offset by the expedited direct examination that  
4 will result from Mr. Gardner and this Court obtaining a preview of the anticipated questions.

5 Further, the grant of limited permissive intervention will protect Mr. Gardner’s right to  
6 appeal orders of this Court: “An intervenor may appeal from ‘all interlocutory and final  
7 orders that affect him ... whether the right under which he intervened was originally absolute  
8 or discretionary.” *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 376 (1987)  
9 *quoting* Moore & J. Kennedy, Moore’s Federal Practice, par. 24-15, pp. 24-169 to 24-170 (2d  
10 3d. 1985).

11 Because Mr. Gardner seeks to obtain an order that will protect his right and obligation  
12 to assert the attorney-client privilege on behalf of his client without creating undue burden on  
13 himself or undue delay in the conduct of the trial, this Court should grant the present motion  
14 for permissive intervention. A grant of permissive intervention will allow Mr. Gardner to  
15 fully litigate this issue.

16 For all the foregoing reasons, the Court should grant the present motion to intervene  
17 under Rule 24(b).

18  
19 Dated: January 19, 2018

ROGERS JOSEPH O'DONNELL

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22 By: /s/ Merri A. Baldwin  
MERRI A. BALDWIN

23 Attorneys for Non-Party  
24 JOHN GARDNER  
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28 <sup>1</sup> Two other usual requirements for permissive intervention, independent jurisdictional  
grounds and a pleading setting forth the proposed claim or defense, are also dispensed with  
when, as here, the intervention sought is for a limited purpose, and does not seek to litigate a  
claim on the merits. *Beckman*, 966 F.2d at 473-474.

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**[PROPOSED] ORDER**

For the reasons stated above, non-party John Gardner may intervene pursuant to Federal Rule of Civil Procedure 24(b) in the above-captioned matter.

DATE: \_\_\_\_\_

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WILLIAM H. ALSUP  
UNITED STATES DISTRICT JUDGE